

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 11, 2009 Session

RONALD C. FRYE v. NORBERT J. SLOVIS, ET AL.

**Direct Appeal from the Circuit Court for Knox County
No. 2-293-94 Harold Wimberly, Judge**

No. E2008-00614-COA-R3-CV - FILED MARCH 16, 2009

Plaintiff initially brought this legal malpractice action in 1994. After a lengthy period of inactivity, Defendants filed a motion to dismiss for failure to prosecute in 2005. The trial court granted the motion, but upon Plaintiff's request, decided to reinstate the action. In 2007, the trial court set a trial date and ordered Plaintiff to respond to Defendants' discovery request. When Plaintiff failed to answer, the trial court again granted Defendants' motion to dismiss for failure to prosecute and failure to comply with the court's order. Finding that the trial court did not abuse its discretion, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

James E. Conley, Memphis, TN for Appellant, Ronald C. Frye

Donald D. Howell, Kevin A. Dean, Knoxville, TN for Appellees, Norbert J. Slovis, Charles C. Lockett, and Marvin J. Weaver, Individually and as the Partnership d/b/a Lockett, Slovis & Weaver

MEMORANDUM OPINION¹

Background

¹Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Ronald Frye (“Plaintiff”) filed this lawsuit *pro se* in Knox County Circuit Court on May 23, 1994. He asserted legal malpractice on the part of Norbert Slovis, Charles Lockett, and Martin Weaver, individually, and their partnership, Lockett, Slovis & Weaver (collectively, “Defendants”). On August 2, 1996, Defendants moved for summary judgment, and Plaintiff filed the Affidavit of attorney James W. Hodges, Jr. in response. The case then remained inactive for several years.

On October 5, 2005, Defendants filed a motion to dismiss for Plaintiff’s failure to prosecute. Plaintiff did not file a response to Defendants’ motion. The trial court set a hearing on the motion for December 16, 2005, but Plaintiff failed to appear. Accordingly, the trial court entered an Order dismissing the action on December 20, 2005. Plaintiff, now represented by counsel, filed a motion to set aside the judgment because he had not received notice of either Defendants’ motion or the scheduled hearing. On April 17, 2007, the trial court reconsidered its ruling and set a trial date for September 20, 2007. A week before trial, however, Plaintiff moved for a continuance because one of his witnesses, James Hodges, Jr., was ill and would be unable to testify. The trial court agreed and set a new trial date for December 11, 2007 with the caveat that the court would not entertain any further requests for a continuance by Plaintiff.

On October 29, 2007, Defendants again filed a motion to dismiss for both failure to comply with a discovery order and failure to prosecute. The trial court had previously ordered Plaintiff to respond to Defendants’ interrogatory by October 12, 2007. Plaintiff concedes that he had not—and still has not—responded to Defendants’ interrogatory. The trial court dismissed the action for the second time, and on February 21, 2008, denied Plaintiff’s motion to alter or amend the judgment.

Plaintiff appeals and raises one issue, as stated in his brief, for review: whether the trial judge abused his discretion by dismissing the Complaint as a sanction. Defendants slightly restate the issue in their brief: whether the trial judge abused his discretion by dismissing Plaintiff’s Complaint based on failure to prosecute and failure to comply with the Court’s discovery order.

Law and Analysis

The trial court dismissed Plaintiff’s action on two grounds: failure to comply with a discovery order pursuant to Tenn. R. Civ. P. 37.02(C) and failure to prosecute pursuant to Tenn. R. Civ. P. 41.02(1). A dismissal for failure to comply with a discovery order is an extreme sanction, but the trial court’s decision will only be disturbed if it abused its discretion. ***Shahrdar v. Global Housing, Inc.***, 983 S.W.2d 230, 236 (Tenn. Ct. App. 1998); ***Alexander v. Jackson Radiology Assocs., P.A.***, 156 S.W.3d 11, 14 (Tenn. Ct. App. 2004). Likewise, a trial court’s decision to dismiss for failure to prosecute under Tenn. R. Civ. P. 41.02(1) is reviewed only for abuse of discretion. ***Hodges v. Attorney General***, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000); ***Kotil v. Hydra-Sports, Inc.***, No. 01-A-01-9305-CV00200, 1994 WL 535542, at *4 (Tenn. Ct. App. Oct. 5, 1994). This discretion is warranted because trial judges possess the inherent authority to control their dockets and the proceedings in their courts. ***Hodges***, 43 S.W.3d at 921. Accordingly, we will reverse the trial court only when it has acted “unreasonably, arbitrarily, or unconscionably.” *Id.*

After reviewing the record, we find that the trial court did not abuse its discretion when dismissing Plaintiff's action. Plaintiff failed to move this case forward for thirteen years—from the filing of the Complaint in 1994 until the second dismissal in 2007. During this period, Plaintiff did not comply with the trial court's order compelling discovery and failed to appear at the trial court's hearing on Defendants' motion to dismiss. Because of these delays, the trial court imposed a severe sanction. We are unable to find that the decision of the trial court was unreasonable or arbitrary.

On appeal, Plaintiff contends that the trial court's dismissal was based solely on Tenn. R. Civ. P. 37.02(C). Although he cites no authority, Plaintiff contends that dismissal on this ground was too harsh because Defendants' discovery request was unnecessary and redundant. We disagree. Dismissal under Rule 37.02(C) is an extreme sanction but appropriate when "there has been a clear record of delay or contumacious conduct." *Shahrdar*, 983 S.W.2d at 236 (quoting *In re Beckman*, 78 B.R. 516, 517 (M.D. Tenn. 1987)). Plaintiff cannot disregard an order compelling discovery simply because he finds discovery unnecessary. *See* Tenn. R. Civ. P. 37.04 ("The failure to act...may not be excused on the ground that discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26.03."). Therefore, we find that the trial court did not abuse its discretion by dismissing Plaintiff's action under Rule 37.02(C).

Finally, Plaintiff's argument that the trial court did not dismiss his action for failure to prosecute is without merit. Defendants' motion to dismiss is explicitly grounded on both Rule 37.02(C) and "Plaintiff's repeated failure to prosecute this matter," and the trial court's Order of Dismissal adopts the Defendants' rationale. Plaintiff contends that the trial court, by reinstating the case in April 2007, set aside Plaintiff's past actions as a basis for dismissal. Plaintiff, however, continued to delay prosecution even after the case was reinstated by requesting a continuance a week before the September trial date. By forgiving Plaintiff's initial delays, the trial court did not grant Plaintiff license to further delay the proceedings. Rather, Plaintiff's early actions provide context for understanding the trial court's decision to employ such an extreme sanction. Furthermore, Plaintiff has not pointed to evidence in the record showing that the trial court abused its discretion. Accordingly, we find that it was well within the trial court's discretion to dismiss the action for a second time under Rule 41.02(1).

A dismissal under either Rule 37.02(C) or Rule 41.02(1) is with prejudice and operates as an adjudication on the merits unless the trial court specifies otherwise. *See* Tenn. R. Civ. P. 41.02(3); *Kotil*, 1994 WL 535542, at *4. Here, we find that the trial court had sufficient grounds under both Rule 37.02(C) and Rule 41.02(1) to dismiss Plaintiff's action.

For these reasons, we affirm the trial court's Order dismissing Plaintiff's action with prejudice. Costs of this appeal are assessed to Appellant Ronald C. Frye and his surety.

J. STEVEN STAFFORD, J.